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ABSTRACT

Academic freedom is an elusive concept. Many university and college faculty members who purport to possess its protections believe they have a solid understanding of its nature and of the individual rights secured by academic freedom. There is some consensus on the meaning of the term in the academic universe. This concurrence of understanding is not evidenced, however, in judicial pronouncements. Pronouncements of the United States Supreme Court regarding this freedom are vague and unstructured, offering little guidance to lower courts and litigants. The author of this paper argues that when the Court suggested academic freedom was entitled to Constitutional protection, it did not originally intend to subjugate the rights of individual faculty members to those of the collective institution. Changes in university and college structures, coupled with broad Court pronouncements, are leading to the diminution of individual faculty members' academic freedoms. Unfortunately, an early misunderstanding of Justice Frankfurter's concurrence in the "Sweezy versus New Hampshire" case has led to a number of questionable decisions relating to individual faculty members' academic freedom. As a result, the protections of academic freedom are to be found in the relationships of faculty members and their institutions. (Contains 36 references.) (RT)

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Academic Freedom: A Precarious Balance.

John A. LaNear

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Academic Freedom:
A Precarious Balance

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I. INTRODUCTION

Academic freedom is an elusive concept. Yet, many faculty members who purport to possess its protections believe they have a solid understanding of its nature, and of the individual rights secured by, academic freedom. In the world of the academy,[1] there is some consensus on the meaning of the term. Professional statements of academic freedom, though somewhat vague (and intentionally so), provide a common understanding of its basic principles. Different institutions adopt the tenets of these professional statements to varying degrees, and though there is always room for debate on the fringes of the freedom, but a commonality of understanding does permeate the professional academy. Judicial pronouncements of academic freedom, on the other hand, do not evidence such a universal genesis or conception of the notion.

The variance between the two conceptions of academic freedom – one professional, the other legal or constitutional - has created significant challenges to those claiming academic freedoms in the courtroom. Outside of the campus environment in which this freedom enjoys common understanding, iterations of the freedom can fall short of faculty expectations. Often, professional expectations of the protections afforded are unmet by judicial declarations of the constitutional basis for the "freedoms" available. Additionally, the lack of a unified understanding can lead to varied constructions of the strictures and foundation of the freedom and the rights that adhere to it.

The United States Supreme Court has discussed academic freedom in a variety of circumstances, leading to an assortment of declarations regarding the importance of such a freedom in a democratic society. But the Court's pronouncements regarding this freedom are

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[1] This paper provides a discussion of academic freedom in the context of higher education. All references to teachers, faculty or the academy are confined to the United States college and university environment unless otherwise specified. References to the academy are intended to include faculty and administrators at colleges and universities collectively.

vague and unstructured, offering little guidance to lower courts and litigants. Additionally, the Court has suggested, albeit inconclusively, that the freedom is entitled to some degree of Constitutional protection. As a result of these inconclusive pronouncements, some lower courts have been hesitant to afford the Constitutional protection alluded to by the Court.

Early academic freedom cases evaluated faculty rights to freedom from state encroachment. Under these circumstances, Court pronouncements of the importance and Constitutional basis of academic freedom were sturdy and more expansive. They declared the right on behalf of individual faculty members, colleges and universities, and the academy as a whole.[2] More recent cases in this vein, however, have pitted faculty members against their colleges and universities, leading to competing claims of academic freedom. This is a circumstance that may not have been foreseen by the Supreme Court as it proffered broad, open statements in support of a more universal academic freedom. These amorphous pronouncements offer little guidance to lower courts attempting to balance the rights of the faculty and the rights of the institutions. While the Court has discussed the issue of academic freedom in various settings, it has yet to directly evaluate the competing individual and institutional claims to academic freedom. As a result, the judiciary is left without a framework or structure in which to evaluate competing claims to academic freedom in the Constitutional context.

In this paper, I argue that, when the Court suggested that academic freedom was entitled to Constitutional protection, it did not originally intend to subjugate the rights of individual faculty to those of the collective institution. Significant changes in college and university structures over the past century have led to competing claims of academic freedom that now face the courts. In other words, the Court originally discussed academic freedom in the context of

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[2] For purposes of academic freedom jurisprudence, courts have not found meaningful distinctions between colleges and universities. Unless otherwise indicated, references to either colleges or universities in this paper are intended to include either or both institutional structures as they are commonly understood.

individual faculty members' rights, not institutional rights. I further argue that the changes in college and university structures, coupled with the broad Court pronouncements are leading to the diminution of individual faculty academic freedoms.

In part I of this paper, I review the historical foundations of American academic freedom, briefly outlining two professional declarations of the basic tenets of that freedom. I also discuss some of the prominent judicial or constitutional definitions of academic freedom propounded by the Supreme Court over the last 50 years. I examine the language utilized by the Supreme Court in several early "academic freedom cases" to flesh out the intended judicial meaning of the concept. In part II, after drawing some intermediate conclusions about the nature and scope of academic freedom in a constitutional context, I review more recent Court cases that support these conclusions. I then discuss the varying contexts in which academic freedom claims have arisen. In part III, I apply the principles elucidated by the Supreme Court (and more clearly enunciated by me in parts I and II of this paper) to a recent problem encountered by lower courts in academic freedom jurisprudence. I conclude with some remarks about the relatively bleak legal/constitutional future – as well as institutional future - of support for academic freedom in American universities, briefly discussing some of the changes in college and university structure over the past 50 years that threaten this vitally important tradition.

II. Part I: A Brief History of Academic Freedom

A. Professional Definitions of Academic Freedom

a. American Association of University Professors' 1915 Declaration of Principles

b. American Association of University Professors' 1940 Statement of Principles on Academic Freedom and Tenure

B. Constitutional Definitions of Academic Freedom

a. Weiman v. Updegraff

b. Sweezy v. New Hampshire

c. Keyishian v. Board of Regents of the State University of New York

C. Recent Court Cases and Contexts

a. Board of Regents v. Roth

b. University of California Regents v. Bakke

c. Regents of the University of Michigan v. Ewing

d. University of Pennsylvania v. Equal Employment Opportunity Commission

D. Contexts for Existence of Academic Freedom

III. Part III: Erosion of Faculty Academic Freedom

A. Brown v. Armenti

B. Edwards. v. California University of Pennsylvania

C. Parate v. Isibor

IV. Conclusion

Unfortunately, an early misunderstanding of Justice Frankfurter's concurrence in Sweezy has led to a number of questionable decisions relating to individual faculty members' academic freedom. Cases are routinely being decided on the misunderstanding of this foundational case. As a result, the protections of academic freedom are to be found in the relationships of faculty members and their institutions. "To combat and redress all the myriad ways in which academic freedom may be undermined and thwarted will always require vigilant and determined self-help activity within the academic community itself. For this, the law will never be a substitute . . .

constitutional law can never be more than an occasional valuable ally in the struggle for academic freedom" (Murphy, 1963, p. 484).

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